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No. 89-1043

In the Supreme Court of the United States

OCTOBER TERM, 1989

WILLIAM W. HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entitled to a jury instruction on multiple conspiracies.

2. Whether an overt act is an essential element of a drug conspiracy punishable under 21 U.S.C. 846.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 882 F.2d 1334.

JURISDICTION

The judgment of the court of appeals was originally entered on August 22, 1989, but it was vacated and reentered on October 24, 1989 (Pet. App. 19a-20a). The petition for a writ of certiorari was filed on December 23, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted on one count of conspiracy to distribute cocaine and to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846, and five counts of using a telephone to facilitate the conspiracy, in violation of 21 U.S.C. 843(b). He was sentenced to 20 years' imprisonment. Pet. App. 21a-24a.

1. The evidence at trial, which is summarized in the opinion of the court of appeals, showed that petitioner, co-defendant Michael Davis, Rolando Soriano, and other individuals conspired with one another to distribute cocaine. The conspiracy began in November 1985 when Davis and Soriano, a Los Angeles drug dealer, met and agreed to work together to import cocaine into Kansas City, Missouri. Soriano supplied cocaine from Colombian drug sources to Davis, who distributed the cocaine to individuals in the Kansas City area. Petitioner served as a "mule" or courier of cash and cocaine for Davis. Pet. App. 2a.

In December 1985, Davis met with Soriano and a drug source named Oswaldo Avilas in Miami, and purchased one kilogram of cocaine for $32,000 in cash. Later that month, Davis sent petitioner to Miami to negotiate a purchase of ten kilograms of cocaine, but Soriano was unwilling to entrust the cocaine to petitioner. Accordingly, Soriano and his "mule," Marcos Rodriguez, drove the cocaine from Miami to Kansas City and delivered it to Davis. Davis was to pay Soriano $350,000 for this cocaine. Pet. App. 2a; Gov't C.A. Br. 14-15.

In February 1986, Soriano arranged another deal between Davis and Avilas for five kilograms of cocaine. Davis's brother was sent to New York to pick up the cocaine and bring it back to Kansas City. Shortly thereafter, the brother drove to Miami with cash intended for Soriano and his sources. Before he could deliver the money, however, Davis's brother was arrested for speeding. The cash impounded from the car, although returned to Davis, was less than the amount believed to have been sent, and there thus arose a shortfall with respect to the transaction. Later that month, Soriano returned to Kansas City to collect money from Davis. Pet. App. 3a; Gov't C.A. Br. 15.

Davis received another delivery of five kilograms of cocaine from Soriano in March 1986. Early in April 1986, Soriano went to Kansas City, where he met with Davis and petitioner and tried to collect money for the cocaine. Later in April 1986, Davis purchased another six kilograms of cocaine from Soriano. Petitioner met Soriano in Los Angeles to take delivery of the cocaine, and he then transported it back to Kansas City by car. Pet. App. 3a; Gov't C.A. Br. 16.

Davis continued to owe money to Soriano for cocaine that had been delivered. Consequently, during May, another one of Davis's "mules," Marlene Fue, made three trips to Miami to transport more than $100,000 in cash to Soriano. Petitioner accompanied Fue on her first trip, and, on another occasion, he provided Fue with money to be delivered to Soriano. Pet. App. 3a; Gov't C.A. Br. 17, 30.

In late May 1986, Soriano came to Kansas City to try to collect more money from Davis for the co-

caine deliveries. By that time, Soriano had become disenchanted with Davis because of his repeated failures to make full payment for his cocaine purchases. During a meeting at which Soriano, Davis, and petitioner were present, Davis excused his failure to pay Soriano on the grounds that petitioner and others had failed to pay him. Petitioner and Davis disagreed sharply over the amount of money petitioner owed Davis. Displeased with Davis's repeated failures to pay, Soriano told Davis to give petitioner the remaining cocaine to sell. Petitioner attempted to arrange another cocaine purchase in June 1986, but Soriano was arrested before the deal was completed. Pet. App. 3a; Gov't C.A. Br. 17, 30.

2. The superseding indictment charged that petitioner, Davis, Soriano, and others conspired to distribute cocaine and to possess cocaine with intent to distribute it from November 1985 until June 16, 1986. At trial, petitioner requested an instruction on the distinction between single and multiple conspiracies. He argued that the evidence showed one conspiracy between Soriano and Davis beginning in December 1985 and ending some time between March and May 1986 and another separate conspiracy between himself and Soriano beginning in late April or May 1986 and ending in June 1986. The district court denied the request for a multiple conspiracy instruction.

Petitioner also requested a jury instruction that the performance of an overt act in furtherance of a drug conspiracy is an element of a violation of 21 U.S.C. 846. The district court also refused to deliver that requested instruction.

3. The court of appeals affirmed. Pet. App. 1a-18a. It rejected petitioner's contention that he was

entitled to a multiple conspiracy instruction, explaining that "when 'the evidence substantially points to a single conspiracy, or [when] the evidence is not sufficient to permit a fair inference of multiple conspiracies, no instruction on multiple conspiracies should be given.'" *Id.* at 11a. In this case, the court found, "the evidence at trial showed one overall agreement among Soriano, Davis and [petitioner] to import cocaine into Kansas City for distribution." *Id.* at 12a. The court acknowledged that the evidence showed that, "as Davis repeatedly failed to pay Soriano, relations between Soriano and Davis cooled, and Soriano dealt more directly with [petitioner]." The court emphasized, however, that the "changes in the coconspirators' roles in this case, rather than suggesting the existence of a new conspiracy, clearly showed only 'the various phases of one basic and overriding plan.'" *Id.* at 12a-13a. The court concluded that "the evidence overwhelmingly established the existence of a single conspiracy." *Id.* at 13a.

The court also rejected petitioner's contention that the district court erred in failing to instruct the jury that an overt act is an essential element of a violation of 21 U.S.C. 846. The court adhered to its decision in *United States* v. *Covos*, 872 F.2d 805 (8th Cir.), cert. denied, 110 S. Ct. 124 (1989); in that case, the court had concluded "that the more persuasive reasoning, as well as the 'overwhelming weight of authority in other circuits,' is that section 846 does not require proof of an overt act." Pet. App. 13a.

ARGUMENT

1. Petitioner contends (Pet. 6-9) that the court of appeals applied an incorrect standard when it assessed whether the evidence was sufficient to justify a jury instruction on multiple conspiracies.

An instruction on multiple conspiracies is required when the indictment charges several defendants with one overall conspiracy but the jury could reasonably conclude from the evidence at trial that some of the defendants were involved only in a separate conspiracy unrelated to the single conspiracy charged in the indictment. As the court of appeals observed, such an instruction need not be given "when 'the evidence substantially points to a single conspiracy, or [when] the evidence is not sufficient to permit a fair inference of multiple conspiracies.'" Pet. App. 11a. The court of appeals held that the district court had properly declined to instruct on the issue of multiple conspiracies in this case because "[t]he evidence overwhelmingly established the existence of a single conspiracy." *Id.* at 13a.

Contrary to petitioner's contention (Pet. 5-6, 8-9), these standards are not materially different from those applied in other circuits. When a court determines that evidence "overwhelmingly establishe[s]" a single conspiracy, it has effectively found that a reasonable jury could not have concluded otherwise. Thus, the denial of petitioner's request for a multiple conspiracies instruction was entirely consistent with standards applied in other circuits. See, *e.g.*, *United States* v. *Linn*, 862 F.2d 735, 743-744 (9th Cir. 1988); *United States* v. *Wilkinson*, 754 F.2d 1427, 1434 (2d Cir.), cert. denied, 472 U.S. 1019 (1985); *United States* v. *Martino*, 665 F.2d 860, 875-877 (2d Cir. 1981), cert. denied, 458 U.S. 1110 (1982);

United States v. *Burrenson*, 643 F.2d 1344, 1348 (9th Cir.), cert. denied, 454 U.S. 830, 847 (1981).

Petitioner's suggestion (see Pet. 3-4, 8) that the court of appeals overlooked evidence supporting the existence of multiple conspiracies presents no question warranting this Court's review. The evidence established that petitioner was an active participant, along with Soriano and Davis, in drug transactions that occurred before the point when, according to petitioner, his conspiratorial relationship with Soriano began. Soriano testified that, in December 1985, Davis sent petitioner to Miami to negotiate with Soriano and another individual concerning the purchase of ten kilograms of cocaine. Pet. App. 2a. In April 1986, Soriano met with both petitioner and Davis in an effort to collect money for cocaine delivered in March 1986. *Id.* at 3a; Gov't C.A. Br. 16. Also in April, Davis sent petitioner to Los Angeles to pick up six kilograms of cocaine from Soriano. Pet. App. 3a. Thereafter, Fue delivered money from petitioner or Davis to Soriano or his sources; on one occasion, in a trip paid for by Davis, Fue was accompanied by petitioner. *Ibid.*; Gov't C.A. Br. 17, 30.

In May, Soriano, Davis, and petitioner met and argued over who, as between Davis and petitioner, was responsible for shortfalls in payments to Soriano for drug shipments up to that point. During that meeting, when Soriano told Davis to give petitioner cocaine remaining from a prior shipment so that it could be sold, petitioner stated that "he had been selling all the drugs for Mr. Davis anyway and that he would go ahead and take it and get rid of it and make sure Mr. Soriano got his money." Gov't C.A. Br. 30. In view of this evidence, the court of appeals was correct in its conclusion that the evidence over-

whelmingly established a single conspiracy. As the court explained, the fact that Soriano came to deal more directly with petitioner as he became disenchanted with Davis "hardly [meant] that the scheme that had started in November 1985 ended and a new conspiracy began." Pet. App. 12a. That evidence did not indicate that "the objective of the scheme as originally agreed to [was] completed, abandoned, renounced, or otherwise terminated"; rather, as the court explained, petitioner and Soriano "simply continued, albeit in closer association, their longstanding efforts to bring cocaine to Kansas City." *Ibid.*

2. Petitioner also contends (Pet. 9-10) that there is a conflict among the circuits on the question whether the commission of an overt act is an element of a drug conspiracy punishable under 21 U.S.C. 846.

Notwithstanding conflicting statements in some early decisions, virtually all courts of appeals have now concluded that a conspiracy under the Controlled Substances Act does not require either an allegation or proof of an overt act. *United States* v. *Savaiano*, 843 F.2d 1280, 1293-1294 (10th Cir.), cert. denied, 109 S. Ct. 99 (1988); *United States* v. *Pumphrey*, 831 F.2d 307, 308-309 (D.C. Cir. 1987); *United States* v. *Bey*, 736 F.2d 891, 893-895 (3d Cir. 1984); *United States* v. *Dempsey*, 733 F.2d 392, 394-396 (6th Cir.), cert. denied, 469 U.S. 983 (1984); *United States* v. *Russell*, 703 F.2d 1243, 1250 (11th Cir. 1983); *United States* v. *Rodriguez*, 612 F.2d 906, 919-920 n.37 (5th Cir. 1980) (en banc), aff'd, 450 U.S. 333 (1981); *United States* v. *Knuckles*, 581 F.2d 305, 311 (2d Cir.), cert. denied, 439 U.S. 986 (1978); *United States* v. *Umentum*, 547 F.2d 987, 989-991 (7th Cir. 1976), cert. denied,

430 U.S. 983 (1977); *United States* v. *DeJesus*, 520 F.2d 298, 301 (1st Cir.), cert. denied, 423 U.S. 865 (1975).

The plain language of Section 846 compels that conclusion. Unlike the general federal conspiracy statute, 18 U.S.C. 371, Section 846 does not require the commission of an overt act as an element of the offense. Rather, it is unlawful to "conspire[] to commit any offense" defined elsewhere in the Act. Congress has thus chosen to model the drug statute after the common law, which did not require proof of an overt act for a conviction for conspiracy. See, *e.g.*, *United States* v. *Bey*, 736 F.2d at 894-895 & n.5; *United States* v. *Dempsey*, 733 F.2d at 395.*

Although there are statements in decisions by the Ninth Circuit suggesting that the performance of an overt act is an element of a violation of Section 846, *United States* v. *Melchor-Lopez*, 627 F.2d 886 (1980); *United States* v. *Tavelman*, 650 F.2d 1133, cert. denied, 455 U.S. 939 (1982), there is no conflict among the courts of appeals calling for this Court's review. Those statements were plainly dicta. In *Melchor-Lopez*, the issue was whether the government had introduced sufficient evidence to prove that a defendant had entered an unlawful agreement with the alleged co-conspirators, and the court thus had no occasion to consider whether his conviction could have been upheld in the absence of proof of

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* Petitioner is mistaken in his assertion (Pet. 9-10) that "the very meaning of the word conspiracy under federal common law implies the requirement of an overt act." Under the common law, it was established that the performance of an overt act was not an element of the offense of conspiracy. *Singer* v. *United States*, 323 U.S. 338, 340 (1945); *Hogan* v. *O'Neill*, 255 U.S. 52, 55 (1921); *Nash* v. *United States*, 229 U.S. 373, 378 (1913).

an overt act. Similarly, in *Tavelman*, the issue was whether a defendant could receive separate sentences for participating in a drug conspiracy and for violating the Travel Act, 18 U.S.C. 1952. Applying the *Blockburger* test, the court concluded that separate sentences could be imposed because "[t]he interstate element of section 1952 is not required under section 846 and the agreement element of section 846 is not required under section 1952." 650 F.2d at 1140. It was thus immaterial whether or not an overt act was an element of a conspiracy punishable under Section 846.

The Ninth Circuit is likely to join other courts of appeals in holding that an overt act is not required for a conviction under Section 846 if it is called upon to resolve that question. The Ninth Circuit consistently held that Section 846's predecessor did not require an allegation or proof of an overt act. See *United States* v. *Murray*, 492 F.2d 178, 192 (1973), cert. denied, 419 U.S. 854 (1974); *Hopkins* v. *United States*, 405 F.2d 770, 772 n.2 (1969); *Ewing* v. *United States*, 386 F.2d 10, 15 (1967), cert. denied, 390 U.S. 991 (1968); *Leyvas* v. *United States*, 371 F.2d 714, 717 & n.4 (1967). Moreover, early decisions in a number of other circuits contained suggestions that an overt act was a prerequisite for a conviction under Section 846. All of those courts, however, ultimately resolved the uncertainty in their decisions against the position that petitioner advocates. See, *e.g.*, *United States* v. *Covos*, 872 F.2d at 809-810; *United States* v. *Rodriguez*, 612 F.2d at 919 n.37; *United States* v. *Dempsey*, 733 F.2d at 395-396; *United States* v. *Savaiano*, 843 F.2d at 1293-1294. Absent any indication that the Ninth Circuit would adhere to dicta in its cases in the face of the present consensus that an overt act is not an

element of a violation of Section 846, that question does not warrant this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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